United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL
Withdrawn
Court Service

74-1071

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

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P/S

HAROLD FISHER,

Plaintiff-Appellee,

-against-

HARRIS, UPHAM & CO. INCORPORATED,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

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THE ISSUES PRESENTED FOR REVIEW

1. Where a defendant and its counsel have engaged, from the inception of the suit and continuing to the date of this appeal, in an unrelenting course of obstructionism, evasion, cover-up and harassing tactics designed to try and exhaust the plaintiff and his counsel, can and should not this Court exercise its inherent power to impose the sanctions of striking the answer, rendering a judgment by default against the recalcitrant defendant, and requiring the defendant or its attorneys to pay all of the reasonable expenses including attorneys' fees, caused to date by said conduct?

2. Irrespective of the appealability of the order of Judge MacMahon, dated and entered November 28, 1973, should this Court hear and consider the appeal where the defendant has neither complied with the order appealed from nor has it applied for nor obtained any stay?

3. Was the interlocutory order of Judge MacMahon dated and entered November 28, 1973, an appealable order?

4. Was the order of Judge MacMahon requiring the defendant to pay to the plaintiff (a portion of) his reasonable expenses, including attorney's fees, caused by the failure of defendant, advised by its counsel, to comply with the prior order of Judge Gurfein on the Rule 34 request properly made and in compliance with Rule 37(b), upon a finding that defendant has clearly violated the prior order, frustrated discovery and failed to exercise the good faith and cooperation demanded by the Federal Rules?

5. Was the order of Judge MacMahon requiring the defendant to comply with the prior order of Judge Gurfein and to complete a thorough search of its own record for all messages and communications, properly made in this case where the defendant has failed to search for, produce, lost or destroyed all other copies of said communications although it was required by law to keep them?

In the
UNITED STATES COURT OF APPEALS
For the Second Circuit

HAROLD FISHER,

Plaintiff-Appellee,

- against -

HARRIS, UPHAM & CO. INCORPORATED,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF FOR PLAINTIFF-APPELLEE

STATEMENT OF THE CASE

This is an appeal by defendant from an order of the United States District Court for the Southern District of New York (MacMAHON, D. J.), entered November 28, 1973, confirming a report of a Special Master, in an action for breach of contract and securities fraud brought by plaintiff-appellee against the defendant-appellant. The

order being appealed awards sanctions to the plaintiff in the amount of $5,000 for violation of the Federal Rules of Civil Procedure and directs further discovery. Defendant's motion for certification of a controlling question of law pursuant to 28 U.S.C. 1292(b) was denied.

To date, upon the instructions of its counsel, defendant has refused to pay the sanctions and to complete the discovery, although no stay has been obtained nor applied for.

SUPPLEMENTARY STATEMENT

The Court's indulgence is respectfully requested with respect to the inclusion at the end hereof of an Addendum* setting forth the relevant and material portions of two Securities and Exchange Commission (hereafter "SEC") Rules and a release, and several Rules of the National Association of Securities Dealers, Inc. (hereafter "NASD").

The Court's further indulgence is respectfully requested with respect to the submission and filing herewith of a Supplementary Appendix to Plaintiff-Appellee's

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* References thereto will be noted "(Addendum, p.)."

Brief* so as to present to the Court (without the need of going to the record itself for reference and examination) certain portions of the record — in fact, omitted portions of documents included in the Appendix prepared and filed by defendant's counsel,* and parts of the record which the defendant's counsel itself stated in its designation would be included in the Appendix, but which were deliberately omitted.

STATEMENT OF THE FACTS

This is an action by an individual customer against his broker (Complaint, A5). The broker, acting as agent for the plaintiff, advised that it had purchased 5,000 shares of stock pursuant to plaintiff's orders and sent the usual written confirmations by mail (Answer, A15). In compliance therewith, the plaintiff paid the defendant $33,099.25 on the settlement dates in October 1968 (Answer, A15).

Thereafter, the plaintiff made repeated requests and demands for delivery of the securities for almost four months (Complaint, A10) without any satisfactory

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* References thereto will be noted "(SA)."
* References to this "Joint Appendix" will be noted "(A)."

response from defendant, whereupon on February 17, 1969, the plaintiff advised the defendant, his agent, to cancel the transactions and to return his money (Answer, A18), which demand was ignored.

The complaint herein was filed on July 29, 1969 (A5). Before answering the complaint, defendant noticed the plaintiff for deposition upon oral examination. Coincidentally plaintiff served a set of interrogatories (A21) upon defendant seeking, inter alia, the details as to the alleged purchases of the 5,000 shares for the plaintiff, the names of the brokers from whom purchased, the details of the deliveries from said brokers and the payments to them of the monies paid by the plaintiff.

Status of defendant

The defendant was a broker-dealer, registered with the SEC, a member of the New York Stock Exchange, and a member of the NASD, and thus subject to various statutes and rules imposing standards of conduct and fair dealing vis-a-vis its customers (Answer, A15). These included inter alia, the Securities Exchange Act of 1934 and the rules thereunder and interpretations thereof adopted by

the SEC, in particular, Rules 17a-3 and 17a-4 detailing the records as to all transactions, receipts and deliveries of securities, etc., required to be kept current and preserved in an easily accessible place (Addendum, p.1-3), and Exchange Act Release No. 8363 of the SEC (33 Federal Register 11,150, August 7, 1968) advising the brokerage industry that it is a violation of the antifraud provisions for brokers to accept or execute orders when transactions cannot be consummated promptly, which includes prompt delivery to the customer (Addendum, p.4). Also see NASD press release of August 7, 1968 (Addendum, p. 6).

Also included were the Rules of Fair Practice and the Uniform Practice Code of the NASD, in particular Section 19 of the Rules of Fair Practice regulating the use which can be made of a customer's securities or funds, Section 21 of the said Rules imposing requirements as to the preservation of books, records, memoranda, and correspondence, Sections 51, 53 and 56(b) of the Uniform Practice Code establishing procedures for the reclamation or return of securities to the selling broker where the transfer of a certificate has been refused by the transfer

agent, and Section 59 of said Code establishing a "buy-in" procedure to close out contracts where sellers have failed to complete contracts (Addendum, pp.7-8). The complaint referred to these statutes and rules, both generally and with some degree of particularity (Complaint, A6-9).

Course of pre-trial discovery

The answers to all of the interrogatories served by plaintiff should have been readily available from the records which defendant was required to make and keep current and easily accessible by the said SEC Rules 17a-3 and 17a-4 (Addendum herein, p.1-3). Defendant moved to extend its time to answer or move with respect to the complaint and to the interrogatories until the completion of plaintiff's deposition (docket entry of August 15, 1969, A2). This motion was denied (Wyatt, D. J.) (Affidavit, A40-41).

Defendant then moved (A37) for a more definite statement of plaintiff's claims and again for an extension of time to answer the interrogatories. This motion was also denied (Bryan, D. J.).

Defendant's answers to the interrogatories (A47) were such, in substance and in form, that they were returned to defendant's counsel for correction (at least as

to form) which was refused, despite plaintiff's counsel's extended personal efforts and visit to defendant's counsel's office (A124, 128). The entire set of answers had been prefaced by the phrase "upon information and belief" (A47), the answers were signed by the attorneys for the defendant (by Charles L. Trowbridge, a member of the firm) (A54), but another officer of defendant signed the verification, perfunctorily stating "(t)he sources of my information and belief are statements and papers relating to the matters in suit" (SA1; Affidavit, A124).

New interrogatories (A28) were served. The answers to these interrogatories (A55), again defective in substance, again prefaced "upon information and belief" and again signed by Charles L. Trowbridge (A58) and now verified in the identically perfunctory manner by yet another officer of defendant (SA2) necessitated plaintiff's moving under Rule 37(a) to compel proper and further answers (A92-130). Plaintiff's counsel's Rule 9(f) affidavit reveals only part of defendant's counsel's attitude which pervaded this entire matter from beginning to date (SA5). The motion was granted by Judge Frankel (A167) and defendant was ordered to pay $250 to plaintiff because defendant's actions with respect to the interrrogatories were not substantially justified.

Contrary to the outrageously false implications of defendant's brief that Special Master Jacobs' limited recommendations were followed and that his report (itself in favor of plaintiff) (A132) was simply approved or confirmed (Appellant's brief, p. 15, 35-6, 41), the proper discussion and analysis should have been of Judge Frankel's decision and order (A167) which significantly overruled, expanded and enlarged the conclusions and recommendations of Master Jacobs, upheld the plaintiff's objections to the answers and granted the plaintiff substantially most of the relief sought.

Judge Frankel directed defendant to correct in excess of 20 separate and distinct deficiencies in defendant's two sets of answers (overruling or enlarging Master Jacobs' report in at least 10 instances). Defendant, after being ordered to serve completely new sets of answers replacing the old sets (A167), was specifically instructed as to the proper form for the same person's signature and the verification of each individual answer (if not upon personal knowledge) (A168), and was also directed by Judge Frankel to answer "completely and unqualifiedly," "directly and specifically," and "fully" (A169).

Defendant provided sets of amended answers (A67; A83), again with incomplete or evasive answers, and a

deliberately evasive and confusing verification SA 3), and filed a note of issue which was ordered withdrawn.

Plaintiff gave up further efforts to obtain meaningful discovery by way of interrogatories, and requested the production of documents and records under Rule 34, F.R.C.P. (A192), tracking the language of and seeking the very records required to be made and kept current and easily accessible under SEC Rules 17a-3 and 17a-4 (Addendum hereto, p.1-3). This request was not complied with, and in June 1971, defendant again filed a note of issue.

Plaintiff moved to compel production of documents and records under Rule 37(a)(2) F.R.C.P. (A186). This latter motion was disposed of by stipulation, "so ordered" by Judge Gurfein (A206), and defendant agreed to the production by October 15, 1971.

This stipulation and order were not fully complied with, but depositions of the defendant's officers were commenced. What happened afterward in the production or non-production of documents and records during the course of these depositions precipitated this appeal.

The examinations of the witnesses were proceeding so poorly that, with the stipulation and consent of all counsel, Judge MacMahon appointed a Special Master to supervise all further discovery proceedings, whether by deposition, interrogatories or production of documents (A207). As a result of being compelled to incur and to waste more than $15,000 in additional expenses (A248, 255) and without discovery being completed, and with new evidence or messages being produced piecemeal by the defendant (A245) and after most depositions were completed, plaintiff made and renewed his pending application to the Special Master for sanctions payable to plaintiff of $15,000 and the striking of defendant's answer (A256-58, 246-247).

Facts and details being discovered

The discovery obtained by plaintiff's counsel was far from an overreaching, immaterial and irrelevant exercise as the defendant's counsel would have this Court believe. It was only as a result of the continued efforts of the plaintiff's counsel in pursuing discovery herein — in overcoming defendant's efforts "to stonewall" and to

avoid discovery of all of the facts and details — which has uncovered facts tending to prove, inter alia,

(a) the defendant never did purchase 5,000 shares for the plaintiff, but only 4,300 (Amended answers to interrogatories, A69),

(b) the defendant received and retained 3,000 "restricted" and non-transferable shares delivered to it on account of purchases for plaintiff's account for more than a full year after the transfer agent refused to transfer (Amended answers to interrogatories, A87) and a year after the plaintiff advised it to cancel the purchases,

(c) the defendant took transferable shares belonging to another customer (who had himself also been requesting and waiting several months for the clearance of his shares in order to obtain payment for the part, 500, of his shares which were sold, and depriving him of his money and shares until August or September, 1969 (A622, 627, 630-33; SA156-58), registered them in plaintiff's name, and sought to force delivery on plaintiff two months after cancellation (A88),

(d) even after being ordered to supply amended answers to interrogatories and revealing for the first time the non-purchase of 700 shares, falsely answered that the never-purchased 700 shares were delivered (or sought to be delivered as above) out of the defendant's own "account," "shares," "holdings" or "position" (Amended answers to interrogatories, A69, 74, 75, 77, 80),

(e) there appears to have been in excess of 80 messages and communications - the number discovered to date, piecemeal - instead of only the eight illegible messages which plaintiff's attorneys chose to disclose in interrogatories (A55, 59-66) and again in the amended answers to interrogatories (A84-85; SA12-18, 34, 144-46, 205-09, 265-68). It appears that rather than only the three employees disclosed in said answer and amended answer, at least four officers (vice-presidents and even the executive vice-president) also were parties or referred to in these messages as having knowledge or participating in events concerning the plaintiff or Bartep shares. These messages, events and identities were uncovered

too late for meaningful discovery or examination (SA31-35, 82, 138-43, 147, 156-59, 177-78, 180-87, 193-204, 210-11, 219-29, 235-39, 253, 261-64, 266-88, A657), and

(f) that defendant's own employees recall that the plaintiff did, in fact, certainly no later than January 1969, repeatedly request delivery of the shares (SA121-31, 138-40) despite defendant's counsel's statements to the contrary throughout these proceedings, including defendant's brief herein, page 27, lines 4 to 6.

The final report of Special Master Galgay recommended that the striking of the answer was too drastic a remedy "at this time" (A249) but that "substantial" monetary sanctions to compensate plaintiff for his expenses were warranted (A250), nevertheless modifying the monetary sanctions requested to be imposed against the defendant for its derelictions to $5,000 (A251). The report also recommended that the defendant be required to complete discovery by the production of all additional messages and documents to be discovered by its search of its own Computerized Wire Service Unit (A250).

Plaintiff moved to modify and confirm the Master's

report (A268-72), and Judge MacMahon, after the Court's own review of the depositions and other papers (A437), rendered an opinion and order dated November 28, 1973 (A430-45) confirming the report in full, in which he stated:

> "We agree with the Special Master that (striking the answer) is too severe a penalty to exact at this time. However, the Court does feel that substantial sanctions are appropriate here since defendant has clearly violated the Rule 34 order, frustrated discovery and failed to exercise the good faith and cooperation demanded by the discovery provisions of the Federal Rules.... Defendant's obstructive conduct has been inexcusable and will not be tolerated." (A438-39).

Defendant moved for reargument, and in the alternative for amendment to include a certification under 28 U.S.C. Sec. 1292(b) (A446-48), which reargument was granted, opinion adhered to on reargument, and certification denied (A449). Defendant appeals from the order of November 28, 1973 (A450).

Defendant, with the consent of its counsel, has failed to obey the said order, has neither paid the sanctions nor completed the discovery, nor has counsel applied for nor obtained any stay, but continues its obstructive and harassing tactics to the irreparable prejudice of the plaintiff.

ARGUMENT

POINT I

IF THIS COURT DOES NOT DISMISS THIS APPEAL SUMMARILY, THEN THIS COURT SHOULD,
(A) SUA SPONTE ORDER THE ANSWER STRICKEN, GRANT SUMMARY JUDGMENT TO THE PLAINTIFF, AND REMAND THE MATTER FOR A DETERMINATION OF THE DAMAGES TO BE AWARDED PLAINTIFF, DUE TO THE EGREGIOUS AND INSOLENT TACTICS AND BEHAVIOR OF DEFENDANT AND ITS COUNSEL THROUGHOUT THE COURSE OF THIS MATTER FROM IMMEDIATELY AFTER ITS INCEPTION; AND
(B) ORDER THE DEFENDANT OR ITS ATTORNEYS TO PAY ALL OF THE REASONABLE EXPENSES INCLUDING ATTORNEY'S FEES CAUSED TO DATE BY SAID CONDUCT.

Summary dismissal

As noted, upon the advice of its counsel, to date, the defendant has failed to obey the order of Judge MacMahon, and continues in its refusal to comply with the order of Judge Gurfein and to complete the discovery and production of documents. It has refused to pay the monetary sanctions intended by Rule 37(b)(2), Fed. R. Civ. P., to remedy or reimburse the plaintiff for part of the expenses caused by defendant's failure to obey the prior order of Judge Gurfein (Addendum p.9).

The defendant did not apply for nor obtain a stay, nor did the filing of the notice of appeal operate as an automatic stay.

Therefore, this Court should dismiss this appeal

summarily and entertain the plaintiff's application under Rule 38, F.R.A.P., for just damages and double costs. The vexatious and frivolous nature of this appeal is self-evident, and consistent with the prior behavior and conduct of defendant and its attorneys from the inception of this matter.

Summary judgment

The flagrant and continued contumacious and harassing behavior of defendant and its attorneys is conspicuously evidenced by its refusal to complete the discovery required by Judge Gurfein's order, as confirmed by Judge MacMahon's order, and further to comply with the order of Judge MacMahon to pay to plaintiff $5,000 for its expenses caused by defendant's failure to comply with Judge Gurfein's order. In the event this Court does not summarily dismiss this appeal by reason of the foregoing, then this Court should exercise its inherent power to strike the defendant's answer, grant judgment to plaintiff and remand the matter for a determination of plaintiff's damages, and order the defendant or its attorneys to pay all of the damages and reasonable expenses, including

attorneys' fees, caused to date by its inexcusable and unjustifiable conduct.

Defendant and its attorneys were insolent and contemptuous in responding, in substance and form, to the interrogatories. Even after Judge Frankel ordered amended answers and directed how a verification should be phrased (A168), defendant supplied answers which were hopelessly incomplete, evasive, and false (A67), and a verification (SA3) (deliberately not reproduced by defendant's attorneys in its appendix) which was a masterpiece of confusion and obfuscation.

Judge Frankel's order directed that the verification should state specifically, with respect to each answer, (a) if upon information and belief, the sources and nature of the information and belief, and (b) if upon knowledge possessed by defendant's officers or employees, identify the persons having the knowledge (A168).

The said verification starts out with a statement that the answers are "true of my own knowledge except..." and then it rapidly deteriorates to an absolute farce. Mr. Dweck excludes from his knowledge the answers to

20 questions on which he "relied on information supplied by" (note, not the knowledge of) other employees. He then volunteers that

> "For all answers I relied on the various records, ledger, memoranda and papers maintained by defendant" (emphasis supplied).

And finally he delivers the coup de grace by adding,

> "As to all those matters on which I relied for information on such records (this now includes every answer) or on information supplied by various employees of defendant, I believe such answers to be true".

There is no statement that any of the employees named have knowledge, merely that Mr. Dweck, in supplying the answers, relied on information supplied by them.

Therefore we are to conclude that there was no officer or employee in defendant's employ who had any knowledge about anything. Incredible! Needless to say, many of the answers were, to be charitable, in error, and to be realistic, so callously investigated or researched as to be false. (See Point III below).

Frankly, by the time defendant's attorney finished with his frivolous objections and interruptions at the depositions of the witnesses produced by defendant's

attorneys as persons to be deposed, they didn't recall, recollect or know anything.

For eight messages or communications to become 80; for officers of vice-presidential rank not to know, recall or recollect any of the events despite their own written messages, wires, communications, conferences, responsibilities and participation in relevant and material matters over a period of weeks and months; for sworn amended answers to state that the never-purchased 700 shares were otherwise supplied from the defendant's own holdings (A69, 74, 75, 77, 80) in April, when the defendant never had owned any shares through June or later (SA19-20, 99-101); there can be no excuse.

As has been noted, the attorneys took command, advised defendant's employees what to search for and took charge of the production of records, papers, messages and communications (SA12-18, 34, 105, 124, 144-46, 158, 193-94, 206-07, 274). Documents were produced, piecemeal, on at least seven occasions during depositions (A245, 434, 437). The attorneys prepared the answers and amended answers, signed the first two sets of

answers (A54, 58), interrupted and interfered with the depositions to a fault, chose which employees and officers in New York to produce and be deposed, and produced no one who knew or could recall anything.

For the correct characterization of defendant's and its attorneys' behavior solely as to discovery of documents throughout this matter up to the date of the order appealed (without the added and aggravating effect of the evasive and false responses to Judge Frankel's order), the Court's attention is directed to the letters of plaintiff's attorney to the Special Master (A254, 256), the Special Master's Report (A243), and the order appealed (A430).

The court below did not merely rely on the Special Master's report. It had read all of the depositions (A437) and reviewed the file.

While plaintiff was refused his request for the striking of defendant's answer as "too severe a penalty to exact at [that] time" (A438), that was before the further contemptuous behavior exhibited by defendant by its failure and indefensible refusal to comply with the latest order, without any stay or other reason or warrant

except to prejudice and harass the plaintiff, and to make it more difficult for plaintiff to continue his struggle against this financial institution.

It is respectfully submitted that, by this time, the striking of defendant's answer is warranted together with an order directing defendant and its attorneys to pay all of the plaintiff's damages and expenses, including attorney's fees, caused to date by their conduct.

POINT II

AN ORDER AWARDING SANCTIONS OF A PORTION OF THE COSTS AND EXPENSES INCURRED BY A PLAINTIFF, CAUSED BY A DEFENDANT'S OBSTRUCTIVE BEHAVIOR AND FAILURE TO COMPLY WITH A PRIOR ORDER DIRECTING DISCOVERY, AND DIRECTING THE COMPLETION OF SAID DISCOVERY, IS NOT APPEALABLE.

The order appealed (Notice of Appeal, (A450); and opinion and order, (A430-45)) is an order pursuant to Rule 37(b)(2), Fed.R.Civ.P. (Addendum p.9). However, it had nothing to do with subparagraph (D) of the Rule. It simply was not a contempt order; not civil, and certainly not criminal. Such orders are non-appealable (International Business Machines Corp. v. United States, 493 F.2d 112, 117 (2d Cir. 1973), cert. denied, 416 U.S. 995(1974).

Upon analysis the order of Judge MacMahon merely requires the defendant to comply with the prior order of Judge Gurfein. The defendant is directed to complete a thorough search of its own records and to produce copies of all otherwise non-produced and missing messages and communications (A440), and to pay a minor portion of the reasonable expenses of the plaintiff caused by the defendant's failures.

The defendant had failed, on a continuing basis and over such an extended period of time and in such an egregious and insolent manner, to obey the order of Judge Gurfein. This conduct had caused wasted expenses on the part of plaintiff in excess of $15,000 by the date of the Special Master's report (SA 7-8, A245, 248, 255, 257-58, 268-70). Therefore, the Rule required that Judge MacMahon direct the payment to the plaintiff of said expenses by the defendant or the attorneys advising the defendant or both.

Defendant's reliance on Southern Railway Co. v. Lanham, 403 F2d 119 (5th Cir. 1968)(en banc), merely because the underlying "contempt" citation had to do with a failure to comply with a discovery order, is unwarranted and unjustifiable. In that case, the defendant had, in fact, been cited for "contempt," and the "fine" of $2,000 was ordered payable to the court, not to the plaintiff. The Court of Appeals properly held that it had jurisdiction to determine, regardless of the characterization by the court below that defendant was in "civil contempt," whether the order was civil or criminal.

After twice stating in its opinion that the important tests to distinguish civil from criminal contempt are the nature and purpose of the punishment, that Court recited as indicative of the purpose of civil contempt that it is wholly remedial, serves only the purposes of a party litigant, and is intended to compensate for damages caused by the recalcitrant's noncompliance. If the defendant herein is, by any stretch of the imagination, deemed to have been found guilty of contempt by Judge MacMahon, it is submitted that under the said tests, it would have to be determined to have been a civil contempt.

Counsel's argument herein that the direction to pay the $5,000 as awarded is the equivalent of the imposition of a punishment for criminal contempt is absurd and frivolous. Defendant's counsel would have this Court believe that Judge MacMahon intended the $5,000 to be a "fine" to be paid to the Court, and not to the plaintiff.

Nowhere in any of the voluminous papers submitted to and the arguments before the Special Master, his report, the motion of plaintiff to modify and to con-

firm the report or the motion of defendant to strike the report, the order or any of the proceedings below, can one find any of the indicia of criminal contempt or the characterization of the money to be awarded as a fine (see Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441-46 (1911). The monetary sanction is remedial, for the benefit of plaintiff, and to compensate plaintiff for the enormous expenses — albeit only a portion thereof — caused by defendant's continued and inexcusable obstruction and non-cooperation in discovery proceedings (opinion and order, A430-45, esp. A438-39).

The court below was not requested to hold the defendant in contempt, neither civil nor criminal; and if either of said contempts had been desired or intended, the procedures and language of Fed.R.Civ.P. Rule 37(b)(2)(D) and Rule 14 of the local Civil Rules of the U.S.D.C. for the So. Dist., on the one hand, or Fed.R. Crim.P., Rule 42, on the other hand, would have been followed and employed. Even if the order below had included provisions treating the defendant's failure to obey Judge Gurfein's order as contempt of court under

subparagraph (D) of said Rule, the award of the reasonable expenses caused by the defendant's failure would be mandated by Rule 37(b)(2) (Addendum p.9).

The citation and reliance upon Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949), the germinal case of the "collateral order doctrine," is equally unwarranted. Words and phrases are wrenched out of context, regardless of their meaning and use in light of the differing facts and circumstances between the Cohen case and the case at bar, and then set down with the conclusory words:

> "... Since the order of the District Court" did something (Defendant's brief, p.22, ll.7-8) (which it didn't do);
>
> "... it is clear that" the issues on this appeal are 'too important ... and too independent of the cause itself' (Defendant's brief, p.22, ll.13-16) (which they aren't);
>
> "... it is clear that" a question is presented which qualifies as 'serious and unsettled' (Defendant's brief, p.23, ll.20-22) (when all that is referred to is an assertion that it might cost the defendant $10,000 to complete its search and production because it destroyed or did not keep copies of communications it was legally obligated to keep); and
>
> "(it) will suffer irreparable and irretrievable loss and damage" (defendant's brief, p.24, l.2) (without any attempt to set forth the grounds or reasoning for that conclusion).

There is no need to belabor the obvious differences between the Cohen case and the case at bar. Furthermore, the Second Circuit has "emphatically declined to apply the Cohen rule to the reluctant witness" (9 Moore's Federal Practice para. 110.13(2), citing United States v. Fried, 386 F.2d 691, 693, 694 (2d Cir. 1967). This position was restated in International Business Machines Corp. v. United States, 480 F.2d 293 (2d Cir. 1973)(en banc).

Defendant cites no case from any circuit holding an order under Rule 34 or 37, Fed.R.Civ.P. appealable. Plaintiff submits that the rationale of Cohen, supra, does not apply in the case at bar; for among other reasons, the order is not "a final disposition of a claimed right" (Cohen, supra, at 546), and the order appealed is fully reviewable on appeal from a final decision in the case (Cf. Alart Associates, Inc. v. Aptaker, 402 F2d 779(2d Cir. 1968).

The order appealed is neither a criminal contempt order nor otherwise appealable under any other doctrine of law.

POINT III

THE ORDER APPEALED WAS PROPERLY MADE

Defendant's posture on appeal is that a misunderstood and abused party who has acted in good faith.

As the Court of Appeals for the Ninth Circuit said on another occasion (Pioche Mines Consolidated, Inc. v. Dolman, 333 F.2d 257, 260 (9th Cir. 1964):

> "One of the difficulties that confronted the trial judge, and that confronts us in trying to review what he did, is that appellants and their counsel have engaged throughout, in a course of obstruction and obfuscation . . . Their conduct exemplifies the old saying: if you can't try the case, try your opponent; if you can't try your opponent, try his lawyer; if you can't try his lawyer, try the judge."

Conduct preceding the discovery of documents.

If it is argued (i) that Special Master Galgay misconceived defendant's prior conduct in answering the interrogatories and in its other acts and actions prior to its behavior during the months of depositions taken in his very presence, and (ii) that the court below (Frankel and MacMahon, D.JJ.) compounded that misconception, this Court's attention is respectfully directed to the

Statement of Facts above, pages 12-15. Continuing on its consistent course of frustration and recalcitrance, the amended answers made pursuant to Judge Frankel's order, were infected with the same vices as the original answers.

The verification was spurious (SA3) and not in accordance with paragraph (1)(a) and (b) (A168). (see Point I above)

The amended answer to interrogatory 11 of the first set (see paragraph (3) of the order (A168)) never supplies the answer as to how, when and where the defendant used over $5,000 of plaintiff's money except the exceedingly vague answer "to ultimately reimburse defendant for its covering plaintiff's account with its own 700 shares of Bartep..."(A80).

The amended answers to interrogatories 5, 8 & 9 of the first set (see paragraph (2) of the order (A168) and the recommendation of Special Master Jacobs as to numbers 8 and 9 (A136)), are incomplete, evasive, hypothetical and in fact, false, as to the never-purchased 700 shares. To the extent the defendant sought to foist upon plaintiff 5,000 shares during April, 1969, none

of them were covered from defendant's "own account" (or "holdings" or "position") (A69, 74, 75, 77, 80). The shares were misappropriated from good shares finally derived and directly traced to the shares belonging to Bernard Miller, who had been and was thereafter kept waiting for money and shares for many, many months (A622, 627, 630-33; SA156-58).

The amended answer (A77) to interrogatory 10 of the first set required by Judge Frankel's paragraph (2) claims an inability to answer despite the keeping of updated daily "fail runs" and fail tickets as subsequently revealed by defendant's own employee (SA51-53), which would indicate the details, and the identity of the brokers, as to all "fails".

The amended answers to interrogatories 13 (A80) and 17 (A81) of the first set fail to comply with the express directions of paragraphs (5) and (6) of Judge Frankel's order (A169). Furthermore, it is exceedingly doubtful that

> "It (was) the defendant's practice to destroy its copies of the notices of buy-in when the certificates to which they apply have been delivered. Since certificates ... were delivered ... any such notices of buy-in would have been destroyed." (A80)

This would have been contrary to law and the Rules, particularly SEC Rules 17a-3 and 17a-4 (Addendum, p. 2, 3); and the lie is further given to the preparer of the answers and the persons who signed the answers and the amended answers by the testimony of defendant's own employee (SA57, 69-74).

Documents and depositions

The Special Master wrote, on June 25, 1973, "(t)he course of these discovery proceedings prior to my appointment and thereafter have been stormy indeed." (A245). He further wrote, (A245):

> ". . . I interrogated defendant's counsel as to the nature of the search it had made for the documents. This questioning was prompted by the piecemeal production that was made by the defendant on at least six or seven occasions during these hearings."

The Special Master had ordered, in September 1972, that defendant conduct a search of its Computerized Wire Service Unit (the existence of which only was revealed in March 1972) (A246). This search revealed more than 130 pages containing messages relating to the particular stock in issue (A247). Only 23 of these had been produced previously (A248). The Special Master concluded as follows (A248-49):

> "I am convinced that the defendant violated the letter as well as the spirit of the Federal Rules of Civil Procedure governing discovery. Magistrate Jacobs and Judge Frankel thought similarly. . . . The manner of piecemeal production made by defendant's counsel during the course of depositions and hearings persuade me that their original search was not as diligent as that required by the Rules. The defendant's discovery of the Computerized Wire Service Unit on March 28, 1972 . . . approximately two years after the filing of the rule 34 motion cast real doubt on the adequacy of its search."

The Special Master was exceedingly polite. The District Judge below wrote more plainly (A433-37):

> "Throughout the Special Master's tenure, plaintiff asserted that defendant had failed to comply fully with an order for production of documents which had earlier been granted by Judge Gurfein. This failure, (A433) plaintiff claimed, was part of a deliberate plan to frustrate discovery. Defendant's production of documents under Judge Gurfein's order was strung out piecemeal during the depositions supervised by the Special Master. This compelled the Special Master to question defense counsel as to the thoroughness of the document search which had purportedly been conducted by defendant in response to the command of the court. Defense counsel excused his failure to produce all of the documents at one time by shifting the blame to an unskilled search staff and asserting that the records had been searched three times. (A434)
>
> * * *
>
> "Defendant apparently bases its objections to the Special Master's findings on its analysis of the documents produced pursuant to the

> Special Master's order of February 23, 1973. . . . Defendant misses the point. Even if we accept defendant's characterization of the documents, the fact remains that the CWS Unit contains some documents included within the scope of the Rule 34 order which defendant has failed to produce for nearly two years. Whether the information contained in those documents is "new" or not, defendant was and is obligated to produce them. (A436)
>
> * * *
>
> ". . .The court's review of the depositions in this case reveals repeated certifications by defendant that production of documents under the Rule 34 order was complete, inevitably followed by further piecemeal production of documents. We can only conclude that defendant, intentionally or unintentionally, failed to conduct the thorough search required by Rule 34. The court agrees with the Special Master that defendant has violated the requirements of the Federal Rules by its continuing failure to produce all the documents covered by Judge Gurfein's order to produce and therefore adopts his findings." (footnotes omitted) (A437)

Defendant's response to this state of affairs is obfuscation and denial.

As to the alleged cost to defendant of the document and message production sought, although defendant's attorneys persist in ignoring the existence of SEC Rule 17a-4 (Addendum, p. 3), it is that rule, paragraph (b)(4) thereof, which required defendant to preserve all inter-office

memoranda and communications, and in an easily accessible place at that. It can not be heard to complain for the results of its own failures.

The cases cited by defendant on the issue of who should bear the expenses of compiling or collating data or information are simply not in point. The court below is not asking defendant to make compilations of anything. Defendant was required to keep the originals and copies of all inter-office messages, may very well still have them, or at least, certainly has admitted having something from which it can re-establish them, and therefore should be required to produce them (SA277-79, 283).

The Tytel and Reid cases, cited in Defendant's Brief at pp. 28-29, dealt with the search of microfilm records and not a case where statutorily required originals and copies of all communications had been thrown away, destroyed or deliberately not searched for by the defendant itself. The quotation from the Konczakowski case, set forth in Defendant's Brief at p. 33, is not only a misquotation, but taken out of context. The Service Liquor Distributors and Sonken-Galamba Corp. cases, cited in Defendant's Brief at p. 31, are of the past when dis-

covery was not viewed liberally by the courts. Both speak of the impermissibility of "fishing expedition(s)" (Service Liquor Distributors, at 347; Sonken-Galamba, at 937).

As to the Waldron case, quoted in Defendant's Brief at p. 30, the court noted the key facts that the plaintiff's claim was "so insubstantial" (summary judgment was ultimately granted), and that the discovery in issue was sought after the case was five years old. Those were the reasons for the hesitation on the part of the court to give carte blanche authority, nevertheless noting that the present Federal rule would permit fishing expeditions.

CONCLUSION

THE APPEAL SHOULD BE DISMISSED SUMMARILY, OR DEFENDANT'S ANSWER STRICKEN AND DAMAGES AND EXPENSES TO DATE AWARDED; OR THE APPEAL SHOULD BE DISMISSED AND THE ORDER OF THE DISTRICT COURT AFFIRMED; WITH DAMAGES AND DOUBLE COSTS FOR THE VEXATIOUS AND FRIVOLOUS APPEAL.

Respectfully submitted,

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ADDENDUM

17 CFR, 240.17a-3 (SEC Rule 17a-3)
(as amended to January 12, 1969)
§240.17a-3

(a) Every member of a national securities exchange who transacts a business in securities directly with others than members of a national securities exchange, ... and every broker or dealer registered pursuant to Section 15 of the Securities Exchange Act of 1934, as amended, shall make and keep current the following books and records relating to his business:

(1) Blotters (or other records of original entry) containing an itemized daily record of all purchases and sales of securities, all receipts and deliveries of securities (including certificate numbers), all receipts and disbursements of cash and all other debits and credits. Such records shall show the account for which each such transaction was effected, the name and amount of securities, the unit and aggregate purchase or sale price (if any), the trade date, and the name or other designation of the person from whom purchased or received or to whom sold or delivered.

* * *

(3) Ledger accounts (or other records) itemizing separately as to each cash and margin account of every customer and of such member, broker or dealer and partners thereof, all purchases, sales, receipts and deliveries of securities and commodities for such account and all other debits and credits to such account.

(4) Ledgers (or other records) reflecting the following:

(A) securities in transfer;

* * *

(E) securities failed to receive and failed to deliver.

(5) A securities record or ledger reflecting separately for each security as of the clearance dates all "long" or "short" positions (including securities in safekeeping) carried by such member, broker or dealer for his account or for the account of his customers or partners and showing the location

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of all securities long and the offsetting position to all securities short and in all cases the name or designation of the account in which each position is carried.

(6) A memorandum of each brokerage order, and of any other instruction, given or received for the purchase or sale of securities, whether executed or unexecuted. Such memorandum shall show the terms and conditions of the order or instructions and of any modification or cancellation thereof, the account for which entered, the time of entry, the price at which executed and, to the extent feasible, the time of execution or cancellation.... The term "instruction" shall be deemed to include instructions between partners and employees of a member, broker or dealer. The term "time of entry" shall be deemed to mean the time when such member, broker or dealer transmits the order or instruction for execution or, if it is not so transmitted, the time when it is received.

(7) A memorandum of each purchase and sale of securities for the account of such member, broker or dealer showing the price and, to the extent feasible, the time of execution.

(8) Copies of confirmations of all purchases and sales of securities and copies of notices of all other debits and credits for securities, cash and other items for the account of customers and partners of such member, broker or dealer.

* * *

(12) (A) A questionnaire or application for employment executed by each "associated person" (as hereinafter defined) of such member, broker or dealer, which questionnaire or application ... shall contain at least the following information with respect to such person:

(1) his name, address, social security number, and the starting date of his employment or other association with the member, broker or dealer;

* * *

ADDENDUM

17 CFR, 240.17a-4 (SEC Rule 17a-4)
(as amended to January 12, 1969)

§240.17a-4

(a) Every member, broker, and dealer subject to Rule 17a-3 shall preserve for a period of not less than six years, the first two years in an easily accessible place, all records required to be made pursuant to paragraphs 1, 2, 3, and 5 of §240.17a-3.

(b) Every such member, broker, and dealer shall preserve for a period of not less than three years, the first two years in an easily accessible place:

(1) All records required to be made pursuant to paragraphs 4, 6, 7, 8, 9 and 10 of §240.17a-3.

(2) All check books, bank statements, canceled checks and cash reconciliations.

* * *

(4) Originals of all communications received and copies of all communications sent by such member, broker or dealer (including inter-office memoranda and communications) relating to his business as such.

(5) All trial balances, computations of aggregate indebtedness and net capital (and working papers in connection therewith), ... and internal audit working papers, relating to the business of such member, broker or dealer, as such.

* * *

(e) Every such member, broker and dealer shall maintain and preserve in an easily accessible place all records required under subparagraph (12) of §240.17a-3 (Rule 17a-3) until at least 3 years after the "associated person" has terminated his employment and any other connection with the member, broker or dealer.

* * *

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Exchange Act Release No. 8363 of the SEC,
33 Federal Register 11,150, August 7, 1968.
(CCH Federal Securities Law Reporter, ¶77,583,
Transfer Binder '67-'69 Decisions)

"The ... Commission today again expressed its concern regarding problems certain broker-dealers are experiencing in carrying out their responsibilities to customers to deliver securities and money promptly and in maintaining accurate and current records of their transactions.

"While the Commission is aware of the many steps being taken by the industry to cope with the delays caused by the large increase in trading volume, it cautions broker-dealers that it is a violation of the antifraud provisions of the federal securities laws, and particularly Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, ... for a broker to buy a security as agent for a customer, ... if the broker-dealer has reason to believe that he will not be able to deliver the security to the customer promptly. This is consistent with the Commission's long standing position taken in Commission decisions and discussed in Securities Exchange Act Release No. 6778, dated April 16, 1962, that a broker-dealer impliedly represents that he will deal fairly with the public and that this representation includes the implied representation that the transaction will be consummated promptly, which includes prompt delivery to the customer.

"Thus, for example, it would be inconsistent with applicable requirements for a broker-dealer ... to purchase (a security) as broker for any other person, if the broker-dealer knows, or has reason to believe, that it is difficult to obtain delivery with respect to a particular security because of delays in transfer or because, in order to obtain the security ... for the customer, it will be necessary to purchase the security from another broker-dealer whose deliveries to him have not been prompt in accordance with traditional customs and usage of the trade.

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"The Commission also warns broker-dealers that it is a violation of applicable antifraud provisions for a broker-dealer to accept or execute any order for the purchase ... of a security ... if he does not have the personnel and facilities to enable him to promptly execute and consummate all of his securities transactions.

"Broker-dealers who are unable to consummate all their securities transactions promptly in accordance with traditional customs and usage of the trade, or who are encountering any delays because of back-office problems of any kind, are compounding their difficulties and increasing the likelihood of disciplinary action being taken against them .... In these cases they should first take the steps necessary to eliminate any backlog which currently exists in the back-office with respect to maintenance of books and records, prompt delivery of securities, prompt payment for securities sold for customers, and also eliminate open or unresolved items such as "DK's", and any other problems which impede their compliance with all applicable securities regulations."

* * *

ADDENDUM

NASD Press Release, August 7, 1968
(CCH Federal Securities Law Reporter, ¶77,584,
Transfer Binder '67-'69 Decisions)

"The National Association of Securities Dealers, regulatory agency for the over-the-counter securities markets, is taking immediate disciplinary action against all broker-dealer members that fail to deliver securities owed to customers because of back office paper work problems.

"In a notice to members, NASD President Richard B. Walbert said that despite the major steps that have been taken to encourage members to cut down paper work backlogs and failures to deliver securities, the situation today is still extremely critical for a large number of firms. 'Shortened hours, one-day a week closings and changes in rules affecting the mechanics of delivering securities have all been helpful', Walbert stated, 'but these measures have not offered a significant breakthrough or resulted in a final solution to the fail problem.' He said, 'more stringent and, in some cases, punitive steps must be taken.'

"The member notice pointed out that NASD rules will be vigorously applied to any firm that engages in business at the same time it has any one or more of the following internal problems:

* * *

> "4. books and records that are not completely up to date; or any other situation which has the effect of violating the obligations which all broker/dealers have of being able to conduct their business properly.

* * *

"It was also announced in the bulletin that the Association anticipated putting into immediate effect two new rules.... The other will prohibit the execution of a sell order for a customer unless the member has possession of the security or has reasonable assurance that the customer can deliver promptly." (Emphasis supplied)

ADDENDUM

Rules of Fair Practice and Uniform Practice Code of NASD (as published in NASD Manual of November, 1968)

RULES OF FAIR PRACTICE

Sec. 19. Customers' Securities or Funds
Improper use

(a) No member or person associated with a member shall make improper use of a customer's securities or funds.

* * *

Segregation and identification of securities

(d) No member shall hold securities carried for the account of any customer which have been fully paid for ... unless such securities are segregated and identified by a method which clearly indicates the interest of such customer in those securities.

* * *

Sec. 21. Books and Records
Requirements

(a) Each member shall keep and preserve books, accounts, records, memoranda, and correspondence in conformity with all applicable laws, rules, regulations and statements of policy promulgated thereunder and with the rules of this Association.

* * *

UNIFORM PRACTICE CODE

Reclamations

Sec. 51. Definition. The term "reclamation," as used in this Code, means a claim for the right to return, or to demand the return of a security previously accepted.

Sec. 53. Manner of Settlement. When a security is returned or reclaimed, the party who orginally delivered it shall immediately give the party returning it either the security in proper form for delivery in exchange for the security originally delivered, or the money amount of the contract. In the latter case, unless otherwise agreed, the party to whom the security is returned shall be deemed to be failing to deliver the security until such time as a proper delivery is made.

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Sec. 56. Wrong Security—Transfer Refused—Stolen Bearer Securities.

* * *

(b) Reclamation in the case where a specific certificate tendered in settlement of a contract has been presented for transfer and transfer thereof has been refused by the transfer agent, shall be within two years unless the Committee for good cause shown determines otherwise. ....

* * *

Close-Out Procedure

Sec. 59. "Buying-in." A contract which has not been completed by the seller according to its terms may be closed by the buyer after the first business day folowing the date delivery was due, in accordance with the following procedure:

(a) Notice of "buy-in." Written notice of "buy-in" shall be delivered to the seller at his office prior to 12 noon, his time, of the day preceeding the execution of the proposed "buy-in." "Buy-in" notices must be manually signed.

* * *

ADDENDUM

Rule 37 Fed. R. Civ. P.

"Rule 37. Failure to make discovery: Sanctions

* * *

"(b) Failure to comply with order. -

* * *

"(2) Sanctions by court in which action is pending.- If a party or an officer, director, or managing agent of a party...fails to obey an order to provide or permit discovery,...the court in which the action is pending may make such orders in regard to the failure as are just, and among other the following:

* * *

"(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

"(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

* * *

"In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

* * *

Received 2 copies of the within
Brief for Plaintiff Appellee
this 15 day of Jan, 1975.

Sig. [illegible]
Gifford Woody Carter Hays
For: ________________ Esq(s).

Att'ys for Defendant Appellant